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THE RIGHT OF INDIVIDUAL EMPLOYEES TO ENFORCE PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS

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This preliminary draft the THE RIGHT OF INDIVIDUAL EMPLOYEES TO ENFORCE PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS by Richard C. Marshall is made available for confidential use within the Division of Review because of its usefulness in connection with other studies.

It is a preliminary draft -- an exploration of the field as a basis for further work. Not all material in it has as yet been verified and checked, nor does it present a fully rounded treatment of the subject.

L. C. Marshall
Director, Division of Review

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THE RIGHT OF INDIVIDUAL EMPLOYEES TO ENFORCE PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS

The importance of permitting the individual employee to enforce provisions of collective bargaining agreements in beyond question. Yet, until a little over a decade ago, the individual employee was virtually powerless to enforce such provisions even for his benefit in the courts. It mattered not that his union and his employer had solemnly signed the most formidable appearing document their lawyers could create, the courts, with but few exceptions, refused the individual employee the power to enforce its provisions. Often the individual employee was refused recovery even though the court agreed that the contract was perfectly valid. Since 1920, however, a marked reverse in this attitude has taken place until today recovery is permitted in over seventy-five percent (75%) of the States that have considered the question, and often the individual employee is permitted to recovery according to the terms of the agreement even though the court say the agreement itself is not a valid contract.

Thus, we have a situation where one state court will deny the individual employee a recovery when the contract is perfectly valid and binding as between the employer and the union while the neighboring state court will hold the contract a mere scrap of paper and yet permit the individual employee to recover according to its terms.

The union and the employer enter into an agreement which nearly always sets forth the wages of the employees and the hours that they shall work, and often contains other provisions, such as the right to a hearing before being discharged. If an employee has not been treated in the way this agreement provides that he shall be treated, common sense would seem to dictate that the courts would lend their power to compel the employer to abide by it.

Despite the earlier hostile attitude, the present trend is very definitely in favor of permitting enforcement by the individual and some courts have gone so far as virtually to reverse themselves and now permit recovery where it was formerly denied.

A striking example of this trend is shown by the decisions of the State of Arkansas in the case of the St. Louis Railway Co. v. Matthews, 64 Ark. 398, 42 S. W. 902 and Moody v. Model Window Glass Company, 145 Ark. 197, 224 S. W. 436. The Matthews case was decided in 1897, the Moody case in 1920. In the Matthews case, the plaintiff below sought enforcement of the provisions of a contract between the railroad company, the defendant below, and the labor union, of which he was a member, which provided that no employer should be discharged by the railroad company without having first been given a hearing on the reasons for his discharge and an opportunity to show that the reasons were untrue. The railroad company reserved the right for final decision in all cases. The court, in its opinion, stated that since Matthews had not agreed to work for any length of time and could quit whenever he decided, that the railroad company was at liberty to discharge him at will, and consequently was not obliged to give him the hearing. Thus, the court decided that the contract was without consideration and void. In the Moody case, the defendant wrote the plaintiff, who lived some distance away, and asked him to come to the defendant's plant and that work would be available for him.

The plaintiff wrote in reply that he would come. Upon the plaintiff's arrival at the plant he was informed that no work was available. The plaintiff sued on a provision in a contract between the union, of which he was a member, and the defendant which provided that in such cases the defendant should be paid at the rate of twenty dollars ($20.00) per week until work was available or defray the expenses incurred by the prospective employee. Nothing in the correspondence between the plaintiff and the defendant contained any reference to the collective bargaining agreement although both parties knew of its existence. Upon the plaintiff's arrival the agent of the defendant told the plaintiff that he would pay the plaintiff the twenty dollars ($20.00) per week as provided in the collective bargaining agreement and actually did pay the sum for two weeks. The Court, in its opinion, said "The correspondence * * * warranted appellants in believing, under the circumstances of the case, that they would be given employment, or be paid in accordance with the provisions of the national agreement, with reference to which the parties must be held to have contracted." Thus the Court squarely held that the correspondence was sufficient to include the collective bargaining agreement even though nothing in the correspondence even remotely referred to it. The only possible interpretation of the facts from which it could be inferred that the parties had contracted with reference to the collective bargaining agreement was that both knew of its existence and both assumed that they were contracting in accordance with its terms.

Illustrations could be given of other states which have done an about face and now permit the individual employee to recover on the collective bargaining agreement.

In permitting recovery the courts have adopted various theories. All of these theories are legal fictions resorted to by the courts apparently in an effort to mete out justice. Professor Williston, in his work on contracts, states that "so far as possible the law should enforce reasonable business agreements seriously made", (*) with little regard to technical

(*) Williston "Contracts" Section 114

questions of consideration. Certainly a collective bargaining agreement is one of the most serious and well considered documents that the average businessman signs. It is often reached after bitter strife and contains the terms under which peace is restored between the employer and his employees. It would seem that in this enlightened age that the courts would be perfectly justified in cutting through technical questions of consideration and the like and enforce the terms which the parties have settled and accepted as binding between themselves. As had already been stated, however, the courts have retained their ancient theories and in cases where recovery has been permitted have adopted various fictions to reach the desired result. These fictions may be divided into three general classes; first, custom and usage; second, agency; third, third party beneficiary.

None of the three fictions are satisfactory for all purposes and if a state adopts one theory to the exclusion of the other two, circumstances are likely to arise where injustice will be done. Perhaps a discussion of the three fictions would be enlightening.

First, Custom and Usage. In this situation the court says in effect that there is really no binding contract between the employer and the labor union in which the employee can claim a vested interest as beneficiary, but the existence of the alleged contract gives rise to an understanding between the employer and the employee that, in the absence of an expression to the contrary, the treaty between the union and the employer shall govern the terms of the employment. This is often expressed as it was in the Moody case, supra, that the parties impliedly contracted in accordance with the terms of the collective bargaining agreement. This theory has many advantages. It permits recovery in states which still refuse recovery on ordinary third party beneficiary contracts; it obviates any questions which might arise in connection with the technical validity of the contract between the labor union and the employer; and the benefits of the treaty between the employer and the union extend to members and non-members of the union alike. On the other hand the employee obtains no vested rights under the collective bargaining agreement and the employer is at liberty at any time to approach any or all individual employees and terminate the contract. Thus, there is no binding or continuing assurance that the employer will continue paying the wages provided in the collective bargaining agreement.

Second, Agency. On this theory the courts say in effect that the labor union is the agent for each one of its members and that the collective bargaining agreement is binding upon the employers just as though a separate contract had been signed by each employee. This theory has not been very widely adopted for the reason that there are technical disadvantages in establishing a principal and agent relationship between the employee and the labor union. Thus, an employee might become a member of the union after the collective bargaining agreement had been entered into and it certainly would be questionable whether the union could be the agent of persons who became members at a future date, especially if there were no express provisions in the agreement covering such a situation. Also, a question would arise in cases where the aggrieved employee was not a member of the union, for it could hardly be said that an employee, not a member of the union, had appointed the union his agent to enter into contracts governing the conditions of his employment.

Third, Third Party Beneficiary Contract. Until 1931, no court of last resort had adopted this theory (*) but recently the trend in this direction

(*) See William Corham Rice, Jr., "Collective Labor Agreements", 44 Harvard Law Review 572 at pages 595-597.

has been very marked. The theory is that the employer and the union enter into a contract which vests in the employees, as beneficiaries under the contract, certain rights upon which they are entitled to recover. The disadvantage of this theory is that many states do not permit recovery by the third party on contracts even for the benefit of third parties, and in addition all of the technical requirements of contracts, such as consideration, must be complied with.

So far as a careful examination has disclosed, there have been adjudications on this point in fourteen different states and in two Federal courts. The Federal courts and the States of Indiana, Texas, and West Virginia hold that the individual employee cannot under any theory enforce the provisions of collective bargaining agreements. The following states hold on one theory

or another that the provisions of collective bargaining agreements can be enforced: Arkansas, Kentucky, Massachusetts, Mississippi, Missouri, Nebraska, New York, Ohio, Oregon, South Carolina, and Tennessee. In the following states no cases have been brought up for adjudication: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. Attached to this report is a table of the States where adjudications have been made giving the State and a brief synopsis of the nature of the case and the theory upon which it was decided. It will be noted that none of the cases were adjudicated before 1920. This does not mean that there were no adjudications before 1920, but strangely enough wherever there was an adjudication before 1920, a subsequent case has come up which has either overruled or clarified the original case, making it unnecessary to set forth any cases prior to 1920.

It will be noted that under existing law recovery on this type of contract is denied the individual employee in twenty-five percent of the states where the question has been definitely adjudicated.

The ligislators of the several states, with the possible exception of the State of Washington, have not seen fit to regulate this situation by statute, and, indeed, in many states this would be impossible owing to stringent provisions of state constitutions with reference to statutory regulation of contracts.

The State of Washington, this year, passed a statute authorizing the municipally owned public utilities of that State to enter into collective bargaining agreements. This does not necessarily mean that the individual employee will be permitted to recover on any contract entered into in pursuance of the statute, yet it is an indication of the present trend.

As has been shown from the explanation of the three theories upon which recovery is permitted, the validity of the collective bargaining agreement as between the employer and labor union is not a criterion of whether the individual employee can recover on agreements, for even though the contract be valid as between the labor union and the employer, the right to recover by the employee might be barred because third party beneficiaries are not granted recovery in the particular state; while on the other hand, although the contract between the employer and the labor union might be invalid, yet the individual employee might be permitted to recover on the theory that the contract established a custom or usage which would be binding upon the employer in the absence of a specific expression to the contrary.

Respectfully submitted,

STATE WITH NAME OF CITATION OF CASE	VALID OR INVALID	TYPE OF CASE AND THEORY UPON WHICH IT WAS DECIDED
ARKANSAS Moody v. Model Window Glass Co., 145 Ark. 197 2245 W. 436 (1920)	Valid	Plaintiff was asked by defendant to report for work and upon reporting was told that no work was at present available but hoped for some soon. Agreement between plaintiff's union and defendant contained a provision that in such cases defendant was entitled to $20.00 per week until work was available or defendant must pay all expenses incurred in getting to site of work and return. Plaintiff sued for $20.00 per week for two weeks and recovery was permitted the court saying that both parties having knowledge of the terms of the agreement, that the hiring was at least impliedly according to its terms, thus creating a custom or usage.
INDIANA Davis V. Davis, Director General of Railroads 151 N.E. 134 (1926)	Invalid	Plaintiff alleged that he had been wrongfully suspended from work and that he was entitled to recover for time lost in accordance with contract between Railroad and Plaintiff's union. Held: The contract merely provided that Railroad was to pay employees such as plaintiff in case of wrongful suspension and employees agreed to do nothing. Therefore, the contract was unenforceable for lack of consideration.
KENTUCKY Gregg v. Starks, 188 Ky. 934, 224 S.W. 459 (1920)	Valid	Plaintiff sued Railroad and others asserting that rights of seniority accorded him in contract between Union and Railroad had not been granted him. Held: Railroad and all conductors whether members or non-members of union assumed that employment was to be under terms of this contract and all must be treated according to its terms. (Custom or usage)

STATE WITH NAME OF CITATION OF CASE	VALID OR INVALID	TYPE OF CASE AND THEORY UPON WHICH IT WAS DECIDED
MASSACHUSETTS Whiting Milk Co. v. Grondin, 184 N.E. 379 (1933)	Valid	Defendant, a member of Union, was employed by plaintiff. One of the provisions of the contract between the Union and plaintiff was that when a member of the Union quit plaintiff's employ, he would not seek connection with a rival company for 90 days. Defendant knew of this provision. Held: The agreement was binding on both plaintiff and defendant who contracted according to its terms. (Custom or usage)
MISSISSIPPI Yazoo & N.V.R. Co. v. Sideboard, 161 Miss. 4 (1931)	Valid	Plaintiff sued for payments in accordance with contract between R.R. and Union. Plaintiff was not a member of Union but contract provided that it should be for the benefit of both members and non-members. Held: Plaintiff was entitled to rely on and accept benefits of contract and defendant was bound thereby. (Third party beneficiary)
MISSOURI Hall v. St. Louis-San Francisco R.R. Co., 28 S. W. (2nd) 687 (1930)	Valid	Employee brought suit under provision in contract between employer and labor union to the effect that no employee could be discharged without first being given a hearing. Held: that the employee was entitled to recover as a beneficiary under the contract.
NEBRASKA Rentschler v. Mo. Pac. Ry. Co., 255 N.W. 694 (1934)	Valid	Plaintiff, a member of the Union, alleged that defendant had discharged him in violation of his seniority rights under an agreement between his union and the defendant. Held: Plaintiff was entitled to recover as a beneficiary under the contract.

STATE WITH NAME OF CITATION OF CASE	VALID OR INVALID	TYPE OF CASE AND THEORY UPON WHICH IT WAS DECIDED
NEW YORK Gulla v. Barton, 164 App. Div. 293	Valid	Plaintiff sued on agreement between Union and Defendant. Held: The Union, as plaintiff's representative, entered into the contract with defendant and defendant is entitled to recover thereon. (Agency theory)
OHIO Blum & Co. v. Landau, 23 Ohio App. 426 (1926)	Valid	Plaintiff, not a member of Union, sued on contract between defendant and Union which provided that it should inure to the benefit of plaintiff. Held: The plaintiff being a beneficiary to the contract was entitled to recover.
OREGON Burton v. Oregon-Wash. R. & Nav. Co. 38 Pac. (2nd) 72 (1934)	Valid	Plaintiff, member of Union, objected to changes in agreement between Union and defendant which would adversely affect his seniority rights. Held: Plaintiff had notice that he would be bound by any changes in contract and he and defendant were bound thereby. (Custom and usage)
SOUTH CAROLINA Johnson v. American Railway Exp. Co., 161 S. E. 473 (1931)	Valid	Plaintiff, member of Union, was peremptorily discharged by defendant when the contract between plaintiff's Union and defendand provided that there must be a hearing before a discharge. Held: The plaintiff was entitled to recover as a beneficiary under the contract.
TENNESSEE Cross-Mountain Coal Co. v. Ault, 157 Tenn. 461, 9 S. W. (2nd) 692 (1928)	Valid	Plaintiff alleged he had been wrongfully discharged in violation of an agreement between defendant and plaintiff's Union (U.M.W.A.) Held: The agreement was binding between plaintiff and defendant unless they entered into an express agreement at the time of employment that the terms should be otherwise. (Custom and usage)

STATE WITH NAME OF CITATION OF CASE	VALID OR INVALID	TYPE OF CASE AND THEORY UPON WHICH IT WAS DECIDED
TEXAS Panhandle & S.F. Ry. Co. v. Wilson, 55 S. W. (2nd) 216 (1932)	Invalid	Plaintiff, member of Union, sought to enforce alleged rights under contract between Union and Railroad. Held: Unless plaintiff ratified the contract he cannot sue under it, for he must determine whether or not he wants to work according to its terms.
WEST VIRGINIA West v. B. & O. R.R.Co., 103 W.V. 417, 137 S.E. 654 (1927)	Invalid	Plaintiff, member of Union, alleged that defendant and Union had wrongfully agreed to change his seniority rating which adversely affected him. Held: Plaintiff could not rely on contract between Union and defendant unless he had personally ratified it as an individual and this he had not done.
UNITED STATES Kessell v. Great Northern Ry. Co., 51 Fed. (2nd) 304 (1931)	Invalid	Plaintiff sued railroad asserting that rights of seniority accorded him in contract between Union and railroad had not been granted him. Held: Railroad made no promise directly to plaintiff and plaintiff cannot enforce any agreement between Union and Railroad.
Yazoo & M.V. R. Co. v. Webb, 64 Fed. (2nd) (1933)	Invalid	Plaintiff claimed he had not been paid in accordance with the classification terms between the Railway and Union. Held: Collective bargaining contracts are usually incomplete and unenforceable pei se. They are treaties or "mutual general offers to be closed by specific acceptances" and acceptance is presumed when nothing else said at time of employment.